IN THE

Supreme Court of the United States

October Term, 1977
No. 77-1308

NATIONAL BROADCASTING COMPANY, INC., and CHRONICLE PUBLISHING CO.,

Petitioners and Defendants,

vs.

OLIVIA NIEMI, by and through her Guardian *ad Litem*, Valeria Pope Niemi,

Respondent and Plaintiff.

On Petition for Writ of Certiorari to the Court of Appeal for the State of California.

Brief of Amici Curiae Writers Guild of America, West, Inc., Directors Guild of America, Inc., and Motion Picture Association of America, Inc., in Support of Petition for Writ of Certiorari of Petitioners and Defendants National Broadcasting Company, Inc., and Chronicle Publishing Co.

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SUBJECT INDEX

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Pursuant to Rules 35 and 42(1) of the Rules of this Court, the Writers Guild of America, West, Inc. ("Writers Guild" or "WGA"), the Directors Guild of America, Inc. ("Directors Guild" or "DGA"), and the Motion Picture Association of America ("Association" or "MPAA") respectfully file their Brief Amici Curiae herein in support of Petitioners' and Defendants' Petition for Writ of Certiorari. The written consents of the parties have been filed. The case is one whose impact will be incalculable upon amici and upon creativity in this society.

Interest of Amici Curiae.

The Writers Guild is the collective bargaining representative for writers who are employed to write the entertainment portion of motion pictures and television programs.

The Directors Guild is the collective bargaining representative for directors who are employed to direct motion pictures or television programs.

Each Guild has industry-wide agreements with the three major networks, including defendant National Broadcasting Company Inc., with all major motion picture and television producers, and with hundreds of other employers. The Writers Guild's membership numbers 4,000 or more writers. These writers are the creators of the dramatic shows, serials, documentaries and other programs which dominate television. The Directors Guild's membership numbers approximately 4,000 or more. Its members are creative personnel who direct the dramatic shows, serials, documentaries and other programs which dominate television.

The Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and distributors of motion pictures to theaters and television in the United States, to wit:

Allied Artists Pictures Corporation
Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer, Inc.
Paramount Pictures Corporation
20th Century-Fox Film Corp.
United Artists Corporation

Universal Pictures, a division of Universal City Studios, Inc.
Warner Bros., Inc.

A major category of prime time television and of the rerun market for television films is the special dramatic show, which may take the form of a one- or two-hour motion picture for television. Such was the award-winning program "Born Innocent", which is the subject of this action. Another major category is the feature motion picture which has previously been released to theaters. Although the specific controversy in the instant case involves a film exhibited on television, the issues posed here and to be answered by the Court will also have direct implications for films exhibited theatrically.

This case is an attempt to impose liability on the producers, exhibitors and advertisers of a television show because of a crime committed by third persons who watched the dramatic show. The ultimate defendants, and the persons truly affected, in such cases will be the writers, producers, distributors and exhibitors of the programs. That is, insofar as its deterrent effect upon creativity and free expression is concerned, the opinion of the California Court of Appeal is the equivalent of imposing liability on the creators of television programs based upon dramatic content of those programs. This case, therefore, will have far-reaching impact on the entire motion picture industry and the public. It raises basic First Amendment issues, and is of special importance to the two Guilds, the MPAA and their members. They are the persons who will be most directly affected by these proceedings and through them the very climate of our society: we point

to the chilling impact on the creativity of writers and directors and on the free expression and dissemination of ideas.

Preliminary Statement and Summary of Argument.

This *amici curiae* brief is confined to the First Amendment issue.

The question presented is whether the exhibitor, and ultimately the writer or producer, can be exposed to civil liability because, allegedly, a viewer of the drama is inspired thereby to commit a crime. It should be emphasized at the outset: this is *not* a case where the writer or publisher has uttered false facts, libeled or invaded the privacy of a plaintiff, or advocated immediate or even remote action.

We believe there can be only one answer to the issue posed by this case: a free society cannot impose a threat of such liability upon writers or others in the creative process, including actors, directors, producers, broadcasters, and their employers. Otherwise, the First Amendment and society's right to the creativity of its members and to the reception of literary and artistic works would be crippled. No authority exists for the imposition of liability as here sought. In fact, the issue is one which the First Amendment, the cases under it, and our society have determined in favor of the creator. We urge that this Court grant certiorari and emphatically reaffirm the governing principles, reverse the California Court of Appeal and approve the trial court's judgment.

ARGUMENT.

I.

The Expression of Ideas and Emotions and Their Representation in Drama on the Stage, in Motion Pictures, or Over Television, Cannot Be Inhibited by the State Through Penal Statutes or by Permitting Its Civil Courts to Impose Liability Therefor.

A. Unless It Is Obscene, the Dramatic Presentation of an Idea or Action Is Fully Protected by the First Amendment.

It has long been the law that dramatic expressions, including mere "entertainment", and their publication and public performance, are protected by the First Amendment.

Winters v. New York (1974), 333 U.S. 507, 510, 92 L.Ed. 840, 847;

Kingsley International Pictures Corp. v. Regents of University of New York (1959), 360 U.S. 684, 3 L.Ed.3d 1512;

Barrows v. Municipal Court (1970), 1 Cal.3d 821, 83 Cal.Rptr. 819.

Indeed, cases involving motion pictures, which are the mass media of dramatic works, have most eloquently expressed this basic point. See *infra*, Part C.

Television, of course, is similarly a mass medium of expression protected by the First Amendment.

Rosenbloom v. Metromedia (1971), 403 U.S. 29, 20 L.Ed.2d 296;

Red Lion Broadcasting Co. v. FCC (1969), 395 U.S. 367, 386, 23 L.Ed.2d 371, 387;

Weaver v. Jordan (1966), 64 Cal.2d 235, 49 Cal.Rptr. 537.

The few and very narrow limitations which this Court has permitted upon free expression (see, *e.g., Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 571, 86 L.Ed. 1031, 1034-1035) simply do not apply to creative literature which is not directed to an attack upon the personality of the plaintiff (*e.g.*, defamation, right of privacy), or which is not obscene or a direct incitement of riot. Omitting such personal attacks and omitting non-protected obscenity, an individual's imagination, emotion and ideas—the core of the protected subject matter of the First Amendment—are entitled to absolute freedom of expression in dramatic literature. Writers, directors and producers are entitled to create, produce, and publish their works without fear of liability, whether imposed by state penal statute or by civil actions brought by alleged injured persons.

In *Gertz v. Welch* (1974), 418 U.S. 323, 339-340, 41 L.Ed.2d 789, the Court stated:

> "We begin with the common ground. Under the First Amendment *there is no such thing as a false idea*. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. . . ." (emphasis added).

The case at bar raises no question of libel or invasion of privacy. Plaintiff's case must rest either on the theory that the publication, like obscenity, is itself infected with danger to society; or on the theory that the defendants' presentation was a direct incitement to the tortfeasor to injure the plaintiff. Apart from the fact that the scene depicting the crime in "Born Innocent" is a fleeting portion of the film, the first theory has no

place in our society and is anathema to our tradition of free speech. The second theory is based on *Weirum v. RKO General, Inc.* (1975), 15 Cal.3d 40, 123 Cal. Rptr. 468. But *Weirum* does not support plaintiff's claim. *Weirum* was a direct exhortation to act, as opposed to discussion or advocacy of an idea. Individual radio listeners were urged to participate in a commercial contest by driving the Los Angeles streets and freeways. Injury resulted from the success of these exhortations.[1]

B. The Expression of Dramatic Ideas and Actions Cannot Properly Be Inhibited by Penal Statutes or by the Threat of Civil Liability Through the Civil Courts.

Unless they are obscene, dramatic presentations cannot be subjected to criminal statutes. See *Winters, Kingsley,* and *Barrows,* cited above, especially *Barrows* at 830 of 1 Cal.3d, hereafter quoted.

The constitutional protection goes much further. What the state may not do by criminal statute, it likewise may not do by civil statute which would impose civil liability for the expression of otherwise protected speech.

This Court stated in *New York Times v. Sullivan* (1964), 376 U.S. 254, 277-278, 11 L.Ed.2d 705:

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[1]The Court's characterization of the case was as follows:

> "The giveaway contest was no commonplace invitation to an attraction available on a limited basis. It was a competitive scramble in which the thrill of the chase to be the one and only victor was intensified by the live broadcasts which accompanied the pursuit." (15 Cal.3d at 48).

Weirum also confirms that the issue, in tort theory, as NBC contends, is one of law. At pages 45-46 of 15 Cal.3d, the Supreme Court stated:

> "The primary question for our determination is whether defendant owed a duty to decedent arising out of its broadcast of the giveaway contest. The determination of duty is primarily a question of law."

> "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel. The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . . Plainly the Alabama law of civil libel is 'a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.' "

The policy reason for prohibiting the imposition of civil liability is that the threat of such liability will inhibit the creativity of artists and creators which is indispensable for a free and progressive society. In his concurring opinion in *Kingsley International Pictures Corp. v. Regents of University of New York* (1959), 360 U.S. 684, 3 L.Ed.2d 1512, which dealt with an obscenity and licensing statute, Justice Frankfurter put it this way:

> "Always remembering that the widest scope of freedom is to be given to the adventurous and imaginative exercise of the human spirit, we have struck down legislation phrased in language intrinsically vague, unless it is responsive to the common understanding of man even though not susceptible of explicit definition. The ultimate reason for invalidating such laws is that they lead to timidity and inertia and thereby discourage the boldness of expression indispensable for a progressive society." (360 U.S. at 695, 3 L.Ed.2d at 1520).

C. Cases Involving Plays and Motion Pictures Dramatically Illustrate the Above Principles and Show That No Liability Can Be Imposed on the Creators and Broadcaster Here.

Although the cases involving motion pictures are primarily license cases or criminal prosecutions (in the obscenity field), this Court has consistently held that ideas and drama are absolutely protected under the First Amendment.

In *Joseph Burstyn, Inc. v. Wilson* (1952), 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, a motion picture film was banned on the ground that it was "sacrilegious." The Court struck down the New York statute. At pages 500-501 of 343 U.S., 1105-1106 of 96 L.Ed., the Court stated (footnote omitted):

> "The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform. As was said in *Winters v. New York,* 333 U.S. 507, 510, 92 L.Ed. 840, 847, 68 S.Ct. 665 (1948):
>
> " 'The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.'
>
> "It is urged that motion pictures do not fall within the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit. We cannot agree."

In *Kingsley International Pictures Corp. v. Regents of New York* (1959), 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed.2d 1512, the New York Court of Appeals held

that the motion picture "Lady Chatterley's Lover" "alluringly portrays adultery as proper behavior," and that the New York legislature by its licensing statute had properly required "the denial of a license to a motion picture 'because its subject matter is adultery presented as being right and desirable for certain people under certain circumstances.'" 360 U.S. at 687-688. This Court reversed and stated:

> "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.
> "Advocacy of conduct proscribed by law is not, as Mr. Justice Brandeis long ago pointed out, 'a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.' *Whitney v. California*, 274 U.S. 357, at 376, 71 L.Ed. 1095, 1106, 47 S.Ct. 641 (concurring opinion). 'Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech. . . .' Id. 274 U.S. at 378." (360 U.S. at 688-689, 3 L.Ed.2d at 1516-1517.)

Bearing in mind the limitations on state action in cases involving the First Amendment (see *New York Times*, 376 U.S. 254, 277-278, *supra*) it is clear that a husband who lost his wife to an adulterer would have no civil cause of action against the writer, producer or exhibitor of a motion picture which discussed or even advocated adultery. It is similarly clear here, we submit, that plaintiff cannot have a cause of action against the defendants for the broadcast of "Born Innocent."[2]

The content of ideas and emotions, especially in dramatic literature, is absolutely protected by the First Amendment. We do not concede in the slightest that the dramatic program here involved was offensive, dangerous, immoral or in any other way condemnatory. But even if it were, the remedy is not to open the courtroom to litigants who claim that third persons were improperly influenced by the broadcast and then caused injury to the plaintiff. As was said in *Butler v. Michigan* (1957) 353 U.S. 380, 383, "Surely, this is to burn the house to roast the pig."

It is not for the Government—whether through penal statutes, licensing statutes, or imposed civil liability upon creators because third persons have been influenced by their works—to shield the public from or to impose liability because of some kinds of speech

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[2]See also *Erznoznik v. City of Jacksonville* (1975), 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125. *Erznoznik* shows that appellant's argument that protection of the health of children is involved and therefore freedom of communication must be restricted and liability may be imposed in this case, is without merit. The court stated:

> "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." (422 U.S. 205, 213, 45 L.Ed.2d 125, 133.)

on the grounds that they are more offensive or dangerous than others. The First Amendment does not permit such a course.

II.

The Self-Censorship Which Would Be Engendered by the Civil Liability Sought to Be Imposed Here Must Be Avoided Under and Is Prohibited by the First Amendment.

From the beginning of this country, there was to be the widest possible freedom to speak and publish.

> "Printing presses shall be subject to no other restraint than liableness to legal prosecution for false facts printed and published." Thomas Jefferson: Proposed Constitution for Virginia, 1783.[3]

Civil statutes which impose liability for speech and which reach beyond the boundary proper under a penal statute violate the First Amendment. The reason is that "the fear of damage awards" constitutes a prior restraint upon free speech and expression. *New York Times v. Sullivan* (1964), 376 U.S. 254, 277-278, 11 L.Ed.2d 686, 705, *supra*, Part I B. As Justice Frankfurter stated in *Kingsley*:

> "The ultimate reason for invalidating such laws is that they lead to timidity and inertia and thereby discourage the boldness of expression indispensable for a progressive society." (360 U.S. at 695, 3 L.Ed.2d at 1520.)

[3]The contrast with other societies is stark:

> "Why should freedom of speech and freedom of the press be allowed? Why should a government which is doing what it believes is right allow itself to be criticized? It would not allow opposition by lethal weapons. Ideas are much more fatal things than guns." V. I. Lenin: Nieman Reports, January, 1956, quoted in "The Great Quotations", compiled by George Seldes, Pocket Book Edition, 1967, p. 392.

And, as was said in *Smith v. California*, 361 U.S. 147, 154, 4 L.Ed.2d 205, 211 (1959):

> "The booksellers' self-censorship, compelled by the state, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

These judicial pronouncements reflect the teaching and experience of our society and of artists themselves. From Shakespeare[4] to the great writers of today, self-censorship created by fear of social pressure or of liability has been seen as a barrier to free and creative expression.

In another time, and in another society, Tolstoy wrote:

> "You would not believe how, from the very commencement of my activity, that horrible Censor question has tormented me! I wanted to write what I felt; but all the same time it occurred to me that what I wrote would not be permitted, and involuntarily I had to abandon the work. I aban-

[4]In King Henry VIII, Shakespeare gives the following speech to Cardinal Wolsey:

> "We must not stint
> Our necessary actions, in the fear
> To cope malicious censors; which ever,
> As ravenous fishes, do a vessel follow
> That is new-trimm'd, but benefit no further
> Than vainly longing. What we oft do best,
> By sick interpreters, once weak ones, is
> Not ours, or not allow'd; what worst, as oft
> Hitting a grosser quality, is cried up
> For our best act. If we shall stand still,
> In fear our motion will be mock'd or carp'd at,
> We should take root here where we sit, or sit
> State-statutes only."

Shakespeare, *King Henry VIII*, Act 1, Scene 2.

doned, and went on abandoning, and meanwhile the years passed away." Quoted by Chaffe, Free Speech in the United States, p. 241, and reproduced as footnote 6 to Chief Justice Warren's dissent in *Times Film Corp. v. City of Chicago* (1961), 365 U.S. 47, 66, 5 L.Ed.2d 403, 417.

Liability may be imposed for the harm directly inflicted on individuals by defamatory falsehood or by unreasonable exposure of intimately personal details of their lives. See discussion, *Gertz v. Welch,* 418 U.S. 323, 341 ff, 41 L.Ed.2d 789, 806. But it is impermissible to extend liability of the creator or publisher to injuries caused by third persons who allegedly were influenced by the content of drama televised to the general public. Such extension would in effect create liability to society at large, as this case itself illustrates, and is unthinkable in a free society. Is the writer of a future "Crime and Punishment", whoever he may be, or the television adapter and producer of Dostoyevsky's classic to be liable to the victims or survivors of axe murders? Is the author of Hamlet to be liable to the heirs of a murdered stepfather? In non-dramatic fields, are the publishers of stories of crimes to be liable to victims of subsequent crimes which are patterned on the details in newspapers or television accounts? We think it is clear that to permit such liability would undermine the First Amendment and the very essence of a free society. The "expression of the sum total of those considerations of policy"[5] which lead a court to define duty and proximate cause require a judgment as a matter of law for defendants here.

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[5]The phrase is Prosser's in Law of Torts (4th Ed. 1971), pp. 325-326.

Conclusion.

Petitioners speak here for the creative community in the television and motion picture industry. Society requires art and drama if it is to exist as a community of feeling and free persons. The inevitable and pervasive censorship and self-censorship that would accompany liability as here sought would be devastating.

We respectfully submit that it will not do to say that all that has occurred in this case so far is that the California courts have not seen fit to prevent a trial. The clear violation of the First Amendment cannot be glossed over on the grounds that a quirk of California procedure is involved, that liability has not yet attached, and that the expensive and debilitating process that stretches ahead will permit the operation and protection of the First Amendment. Lawyers and judges know better than most that trials are still ordeals by combat, that emotions and pockets are stripped and drained by litigation, and that the threat of the courthouse serves still as a deterrent to lawful acts and free expression. Consequently, the severe inhibition upon creativity and expression will flow as much from the threat of expensive and debilitating litigation as from adverse jury verdicts. The hand of the law will be heavy on the hand of the writer, and his imagination will be enveloped by the cloud of potential litigation.

We are dealing here with freedom and the creative process. As the California Supreme Court stated in a comparable setting:

> "Courts must therefore move here with utmost caution; they tread in a field where a lack of restraint can only invite defeat and only impair

> man's most precious potentiality: his capacity for self-expression." (*Zeitlin v. Arnebergh* (1963), 59 Cal.2d 901, 923, 31 Cal.Rptr. 800).

A hearing should be granted by this Court and the judgment of the trial court should be affirmed clearly and emphatically. Because the mere filing of such actions to some extent must inhibit the free expression of ideas, no potential plaintiff should be given hope that a similar suit will succeed in the future.

Respectfully submitted,

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